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The National Environmental Policy Act

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Predating the Environmental Protection Agency, the National Environmental Policy Act (NEPA) was the legislative vanguard for environmental laws and regulations, but 40 years of experience has proved that NEPA is out of sync with present environmental, political, social, and economic realities. The intended goal of environmental stewardship is thwarted by the project delays and higher costs imposed by the NEPA regulatory regime, as well as by the politicization of science and the influence of special interests. Ultimately, NEPA must be rescinded. In the interim, there are several steps Congress can take to mitigate the harm caused by this obsolete statute.

The National Environmental Policy Act of 1969 requires federal agencies to assess the potential environmental impacts of proposed government actions, including public works projects, leasing federal lands, regulation, and permitting, but four decades of experience has exposed fundamental flaws in the statute and its application, including costly project delays, politicization of even mundane rulemaking, and protracted litigation. Thus, there are compelling reasons to rescind NEPA and to rely instead on more efficient and effective methods of environmental protection.

Since its passage in 1969, NEPA has remained largely unaltered despite dramatic changes in America's economic, social, political, and environmental landscapes. This continuity reflects, in part, the reverence bestowed upon the statute by the environmental lobby. It was NEPA, to a large extent, that signaled the launch of environmental regulation—the precursor to the Environmental Protection Agency and virtually all of the nation's environmental laws. It also provides activists with a powerful means of obstructing transportation, energy, and natural resource projects they oppose. But with dozens of other environmental regulations also in force, and considering NEPA's inherent flaws, there is little reason to preserve it.

The consequences of NEPA extend well beyond the Beltway. Agencies can require private companies to pay for the NEPA analyses if their projects receive government funding, involve federal land, or require a permit, which is increasingly common given the unconstrained expansion of government. To the extent a project encounters opposition at any point in the process, it can be waylaid for months or even years, thereby increasing project costs and delaying the economic benefits that otherwise would accrue from investment. And there is no telling whether the project or permit will be authorized as planned; each agency has authority to dictate conditions regardless of whether the applicant approves or is equipped to carry them out.

Horror stories abound. For example, it took Revett Minerals *17 years* to obtain a permit for mining in western Montana.[1] The average NEPA process ranges from three to six years, according to various studies.

1 Testimony of Laura Skaer, Executive Director, Northwest Mining Association, before the Committee on Resources, U.S. House of Representatives, NEPA Task Force, April 23, 2005, http://www.nwma.org/Issues/NEPA%20Testimony.doc (accessed April 25, 2012).

How NEPA Works

As set forth by Congress, the purpose of NEPA is to:

> *[E]ncourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation. ...”*[2]

Such sentiments reflect lawmakers' faith that federal bureaucrats can dispassionately assess their own proposed actions as long as they amass enough data and solicit public comment (including comment from local, state, municipal, and tribal authorities).[3] In actuality, the NEPA process is an administrative contrivance. A study of NEPA effectiveness by the White House Council on Environmental Quality (CEQ) found that agencies often conduct the environmental assessment *after* program planning is underway—too late for the results to influence strategic choices as lawmakers intended.[4]

The text of NEPA is relatively brief—just 3,200 words—but compliance is a protracted affair. For example, *The NEPA Book: A Step-by-Step Guide on How to Comply with the National Environmental Policy Act* runs to 475 pages.[5]

Unlike many other environmental statutes, NEPA is not a “substantive” law; rather than mandating specific outcomes, it imposes procedural obligations on federal agencies. The Council on Environmental Quality has crafted the steps that agencies must follow, but the agencies are responsible for deciding whether or how to modify project plans in light of the NEPA findings.

NEPA requirements kick in whenever a federal agency proposes a “major action” that could significantly affect the environment. The range of applicable actions is broad, encompassing government financing, technical assistance, permitting, regulations, policies, and procedures. Every agency in the executive branch must comply with NEPA requirements. (The statute does not apply to the President, Congress, or federal courts.)

Congress intended NEPA to be a planning tool capable of “integrat[ing] environmental concerns directly into policies and programs.”[6] For example, the Federal Aviation Administration (FAA), as part of its planning to construct a new air traffic control tower for the Toledo Express Airport, must conduct a NEPA assessment.[7] The assessment will include, in part, the potential effects on air quality; biological resources (fish, wildlife, and plants); noise; land use (including coastal resources); geology and soils; solid waste; health and safety; environmental justice; children's environmental health and safety; and water quality (including floodplains and wetlands). The FAA must also evaluate alternatives to the proposed action, if feasible, and solicit public comment on the plan.[8]

There are several steps in the NEPA process:[9]

- **Environmental Assessment.** This initial assessment determines whether the proposed federal action will significantly affect the environment. If the assessment indicates that the impacts will not be significant, the agency next prepares a “finding of no significant impact” (see below). If the

2 National Environmental Policy Act of 1969, 42 U.S.C. 4321–4347, January 1, 1970, http://ceq.hss.doe.gov/nepa/regs/nepa/nepaeqia.htm (accessed May 7, 2012).
3 Daniel R. Mandelker, “The National Environmental Policy Act: A Review of Its Experience and Problems,” *Journal of Law & Policy*, Vol. 32, No. 293 (2010), pp. 293–312.
4 Executive Office of the President, Council on Environmental Quality, *The National Environmental Policy Act: A Study of Its Effectiveness After Twenty-five Years*, January 1997, http://digital.library.unt.edu/ark:/67531/metadc31142/m1/1/ (accessed May 7, 2012).

5 Ronald E. Bass, Albert I. Herson, and Kenneth M. Bogdan, *The NEPA Book: A Step-by-Step Guide on How to Comply with the National Environmental Policy Act* (Point Arena, CA: Solano Press, 2001).

6 Mandelker, “The National Environmental Policy Act: A Review of Its Experience and Problems.”
7 U.S. Department of Transportation, Federal Aviation Administration, “Notice of Availability of a Draft Environmental Assessment for a Proposed Airport Traffic Control Tower and Base Building, Toledo Express Airport, Swanton, OH,” *Federal Register*, Vol. 76, No. 158 (August 16, 2011), p. 50809, http://www.gpo.gov/fdsys/pkg/FR-2011-08-16/pdf/2011-20750.pdf (accessed May 7, 2012).
8 Council on Environmental Quality, *The National Environmental Policy Act*.
9 Ibid.

impacts are likely to be significant, the agency must prepare an "environmental impact statement."

- **Finding of No Significant Impact.** This is the determination by the agency that a proposed action will not have a significant impact on the environment and therefore does not require further action under NEPA.
- **Mitigated Finding of No Significant Impact.** This is a determination by the agency that a proposed action will not require further action under NEPA if specific mitigation requirements (e.g., erosion controls) are met.
- **Categorical Exclusion.** This constitutes a type of NEPA waiver for a category of actions that do not individually or cumulatively have an effect on the environment. An action that falls into a categorical exclusion does not require an environmental assessment or an environmental impact statement.
- **Environmental Impact Statement.** This is a thorough analysis of a proposed action's effect on the "human environment," as well as an evaluation of alternatives to the proposed action.
- **Record of Decision.** This refers to the agency's rationale for choosing a specific course of action, including an account of the factors considered by the agency and the alternatives evaluated, a description of any mitigation measures to be implemented, and an explanation of any monitoring requirements.

Public meetings or hearings may be held at various stages in the process. Documents and requests for comments are routinely published in the *Federal Register*, and every procedural step is open to scrutiny, comment, and legal challenge.[10] Consequently, critics have considerable opportunity to delay project planning.

When analyzing potential impacts on the "human environment," agencies technically are required to consider the aesthetic, historic, cultural, economic, social, and health effects of their proposed actions,[11] but agencies control the substance of a NEPA analysis by carefully shaping the "scope"—the delineated "purpose and need"—of their projects. How they do so effectively defines the parameters of the potential outcomes as well as the alternatives the agencies must consider.[12] Consequently, the agencies can effectively control the outcome of the NEPA review through deliberate scoping. This contradicts the conservation ethic Principle VI of managing natural resources on a site-specific and situation-specific basis.

Agency officials are required to solicit comments on their impact statements from other agencies that have relevant jurisdiction or expertise. (State and local agencies also may be included.) When asked for comment, agencies are required to respond, and interagency disputes are referred to the Council on Environmental Quality.[13]

As mandated by the Clean Air Act, the EPA reviews and comments on all environmental impact statements prepared under NEPA.[14] In the event EPA officials regard an agency's actions as "unsatisfactory from the standpoint of public health or welfare or environmental quality," the case is referred to the CEQ. However, the lead agency is not obligated to alter its proposed course of action in the face of objections from either the EPA or the CEQ.

NEPA in Practice

The nation had little experience with environmental regulation

10 NEPA does not contain a citizen suit provision, but judicial review of agency actions may be secured under the Administrative Procedure Act.
11 Dinah Bear, "Some Modest Suggestions for Improving Implementation of the National Environmental Policy Act," *Natural Resources Journal*, Vol. 43, No. 4 (Fall 2003), pp. 931–960, http://lawlibrary.unm.edu/nrj/43/4/02_bear_national.pdf (accessed May 7, 2012).
12 Mandelker, "The National Environmental Policy Act: A Review of Its Experience and Problems."

13 Holly Doremus, "Through Another's Eyes: Getting the Benefit of Outside Perspectives in Environmental Review," *Boston College Environmental Affairs Law Review*, Vol. 38, No. 2 (2011), pp. 245–278, http://ssrn.com/abstract=1735748 (accessed May 7, 2012).
14 Aliza M. Cohen, "NEPA in the Hot Seat: A Proposal for an Office of Environmental Analysis," *University of Michigan Journal of Law Reform*, Vol. 44, Issue 1 (Fall 2010), p. 169.

in 1969, when NEPA was written. Based on the construction of the statute, lawmakers appear to have been relatively naïve about the limits of environmental science, the machinations of bureaucratic self-interest, and the distortions of policy wrought by judicial activism—all of which have rendered the NEPA process costly, time-consuming, and riddled with conflict.

The Obama Administration acknowledged these shortcomings by effectively waiving NEPA requirements for "stimulus" projects funded under the American Recovery and Reinvestment Act. Ordinarily, NEPA review for federal construction projects spans an average of 4.4 years,[15] but Energy Department Secretary Steven Chu said cutting the NEPA red tape was necessary to "get the money out and spent as quickly as possible. It's about putting our citizens back to work."[16] A great many business owners can only wish that the federal government applied the same consideration to their attempts to comply with NEPA.

The very heart of NEPA—the environmental impact statement—is grounded in a notion of the environment as static and predictable. That is, agencies construct a baseline measure of environmental conditions and model the anticipated impact of government actions. This approach conflicts with conservation ethic Principle II: that natural resources are resilient and dynamic. Furthermore, as researcher Sam Kalen notes, such a simplistic approach fails to account for the complex nature of ecosystems.[17]

In reality, perfect information about the environment does not exist, nor can scientists accurately forecast how complex environmental systems will respond to ever-changing conditions over time. Therefore, the impact analyses are largely grounded in assumptions with weak predictive quality.[18]

The scientific integrity of the NEPA process also suffers from a lack of consistent methodology. The CEQ has left agency officials free to apply any assessment approach of their choosing, but thorough cost-benefit analyses are rare. In fact, soon after enactment, NEPA drew criticism from some scientists as being little more than "massive amounts of incomplete, descriptive, and often, uninterpreted data."[19] The American Conservation Ethic Principle VII, on the other hand, embraces science as one tool to guide public policy.

Also problematic is the fact that federal agencies are constantly embroiled in political skirmishes, simultaneously called to account by Congress, the White House, courts and activists. Given the broad discretion that agencies wield, officials must contend with the competing demands of various interests—including their own—at every step of the NEPA process. But as embodied in the American Conservation Ethic , private property owners, not government and politics, offer the most promising opportunities for environmental quality.

The complexity of NEPA is magnified to the extent federal projects require interagency coordination. As noted by the CEQ, "Agencies often have different timetables, requirements, and modes of public participation."[20] Imagine the complications arising from states, local governments, and tribes having to meet 26 different federal planning requirements to obtain project funding from Washington.

Whether through compromise or by edict, the end result of the

15 U.S. General Accounting Office, *Highway Planning: Agencies Are Attempting to Expedite Environmental Reviews, But Barriers Remain*, RCED-94-211, August 2, 1994, http://www.gpo.gov/fdsys/pkg/GAOREPORTS-RCED-94-211/html/GAOREPORTS-RCED-94-211.htm (accessed May 7, 2012).

16 Kristen Lombardi and John Solomon, "Obama Administration Gives Billions in Stimulus Money Without Environmental Safeguards," *The Washington Post*, November 28, 2010, http://www.washingtonpost.com/wp-dyn/content/article/2010/11/28/AR2010112804379.html (accessed May 7, 2012).

17 Sam Kalen, "The Devolution of NEPA: How the APA Transformed the Nation's Environmental Policy," *William & Mary Environmental Law and Policy Review*, Vol. 33, No. 2 (2009), http://scholarship.law.wm.edu/wmelpr/vol33/iss2/4 (accessed May 7, 2012).

18 Council on Environmental Quality, *The National Environmental Policy Act*.

19 D. W. Schindler, "The Impact Statement Boondoggle," *Science Monthly*, Vol. 192 (1976), p. 509; S. M. Bartell, "Ecology, Environmental Impact Statements, and Ecological Risk Assessment: A Brief Historical Perspective," *Human and Ecological Risk Assessment*, Vol. 4 (1998), pp. 843, 844.

20 Council on Environmental Quality, *The National Environmental Policy Act*.

NEPA process is unavoidably political in nature. This is evident, for example, in the NEPA guidelines on global warming. The CEQ issued these guidelines after more than a dozen lawsuits were filed to force agencies to include the impacts on climate change in NEPA reviews.[21] While the guidelines reflect the political position of the Obama Administration, they lack scientific substance.

The deference granted to agencies under NEPA—both by statute and by legal precedent—presumes that agency personnel possess the expertise to complete a scientifically sound environmental assessment and that agency officials will follow NEPA requirements in a timely fashion. Such presumptions, however, fail to account for the organizational dynamics in play.

For example, bureaucrats have every incentive to ignore information that does not comport with the prevailing view of the agency's mission—a penchant that researcher Holly Doremus refers to as "mission agency syndrome."[22] She and others also identify a "rubber stamp syndrome"; i.e., the tendency within government agencies to recycle data and analysis rather than approach each NEPA review as unique.[23] And then there are agencies prone to the "past performance syndrome," whereby officials assume that no problem will arise in the future because none has occurred in the past.[24]

An astonishing number of laws and regulations intersect with the NEPA process.[25] Consequently, the NEPA outcome could conflict with the findings of the other regulatory reviews. As noted by the CEQ, "Similar potential problems exist with respect to other Federal, State and local compliance efforts."[26]

Congress has intervened with legislation to streamline the NEPA process for select federal programs. However, activists complain that such legislation undermines the purpose of NEPA and restricts their ability to affect agency decisions through judicial intervention.[27] But there is still plenty of opportunity for lawsuits—so much so, in fact, that agencies routinely attempt to create "litigation-proof" documents, a tactic which drains dollars and time without improving analytic quality.[28]

The consequences of the litigation frenzy go well beyond the financial. In the case of the Army Corps of Engineers and New Orleans levees, for example, the impact proved deadly. A lawsuit filed under NEPA in the late 1970s by local fisherman and an environmental group resulted in a federal court order enjoining the Corps from moving ahead on its New Orleans levee project. Ultimately, the Corps abandoned its original design and adopted an alternative that failed to protect New Orleans residents when Hurricane Katrina slammed the city.[29]

The Need for Real Reform

In March 2012, the Council on Environmental Quality, as it has multiple times in years past, issued draft guidance on improving NEPA reviews, but other than encouraging agencies to be "concise" or to "concentrate on relevant analysis," the guidance lacked meaningful reforms. Notwithstanding the good intentions of its creators, the National Environmental Policy Act has outlived its usefulness. Rather than inject environmental stewardship into the actions of federal agencies, the NEPA process has become little more than a bureaucratic boondoggle.

21 Cohen, "NEPA in the Hot Seat."
22 Doremus, "Through Another's Eyes."
23 Ibid.
24 Ibid.
25 Council on Environmental Quality, *The National Environmental Policy Act*.
26 "Improving Implementation of the National Environmental Policy Act (NEPA)," The INGAA Foundation, Inc., June 1, 2000, http://www.ingaa.org/INGAAFoundation/Studies/FoundationReports/274.aspx (accessed May 7, 2012).
27 Mandelker, "The National Environmental Policy Act: A Review of Its Experience and Problems."
28 Council on Environmental Quality, *The National Environmental Policy Act*.
29 Thomas O. McGarity and Douglas A. Kysar, "Did NEPA Drown New Orleans? The Levees, The Blame Game, and the Hazards of Hindsight," *Cornell Law Faculty Publications*, Paper No. 51, September 8, 2006, http://scholarship.law.cornell.edu/lsrp_papers/51 (accessed May 15, 2012).

Recommendations

Few areas of federal law undergo the constant change that characterizes environmental statutes and regulation. Since adoption of NEPA in 1969, dozens of environmental laws have been enacted, and hundreds (if not thousands) of regulations have been added to Title 40 (Protection of Environment) of the Code of Federal Regulations. States and municipalities likewise have enacted environmental protections.

Federal agencies must comply with all environmental requirements just as private parties do. Consequently, NEPA is an anachronism that unduly complicates federal projects, encourages judicial activism, politicizes rulemaking, and blurs distinctions between environmental risks.

Rescission of NEPA is the main goal. The following steps can pave the way to rescission and improve some of NEPA's problems:

Narrow NEPA reviews. The multitude of other regulatory requirements makes a full-scale NEPA review both unnecessary and redundant. Reviews should be limited to major environmental issues that are not dealt with by any other regulatory or permitting process.

Mandate time limits. As with many other environmental statutes, deadlines for agency decisions at every procedural step should be established. The lack of deadlines contributes to years of delay for projects, which in turn increases costs while eroding benefits.

Establish functional equivalence. Myriad other statutes require environmental impact analyses. Rather than duplicating others' work, NEPA should provide for agencies to treat existing analyses as functional equivalents of a NEPA analysis. When case facts among projects are similar, agencies also should incorporate previous analyses and those by other agencies rather than beginning anew.

Limit alternatives studied. The NEPA process is unnecessarily prolonged by evaluation of alternative actions that stray beyond the actual purpose of the proposed project. NEPA evaluations should be limited to alternatives that would accomplish the stated goal at less cost and with available technologies.

Establish a lead agency. For projects that involve multiple agencies, responsibility for NEPA should be assigned to a "lead" department. The involvement of other agencies should be strictly limited to issues that fall within their specified jurisdiction or expertise.

Eliminate GHG determinations. There is no credible scientific evidence that positively attaches a specified volume of greenhouse gases to environmental impacts. In the absence of any cause/effect nexus, there is no rational purpose to requiring agencies to undertake an analysis of GHG emissions as part of the NEPA process.